

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KIMBERLY WEBB . C.A. NO. H-17-3829
VS. . HOUSTON, TEXAS
CITY OF HUNTSVILLE POLICE . SEPTEMBER 2, 2020
DEPARTMENT, et al . 10:00 A.M. to 10:49 A.M.

TRANSCRIPT of STATUS CONFERENCE
BEFORE THE HONORABLE ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

APPEARANCES: (All participants appearing via Zoom or phone.)

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1 P R O C E E D I N G S

2 THE COURT: This is Cause No. 4:17-cv-3829, Kimberly
3 Webb versus City of Huntsville Police Department, et al.

4 Will counsel, please, enter an announcement for
10:01:05 5 the record.

6 MR. POERSCHKE: My name is Scott Poerschke, attorney
7 for Kimberly Webb.

8 MR. HELFAND: Good morning, Your Honor. Bill Helfand
9 and Sean Braun for the City of Huntsville.

10 THE COURT: Very well. Counsel, the Court has before
11 it plaintiff's opposed emergency motion to extend the
12 scheduling order to depose witness and motion for leave to
13 conduct discovery under Federal Rule of Civil Procedure 56(e),
14 which is Document No. 54. The Court has the response from the
10:01:43 15 defendant at Document No. 57.

16 Counsel for the plaintiff, were there any other
17 documents that the Court needed to be aware of?

18 MR. POERSCHKE: No, Your Honor. Even though some of
19 this does track back to the motion for new trial that I filed
10:02:06 20 previously on this matter.

21 THE COURT: The Court is aware of those motions as
22 well.

23 And counsel for the defense, were there any
24 additional motions or documents that the Court needed to be
10:02:17 25 aware of for the purposes of this hearing?

10 : 02 : 20 1 *MR. HELFAND:* No, Judge, I don't think so.

2 *THE COURT:* Very well. We'll turn our attention to
3 the plaintiff, as it's the plaintiff's motion. Counsel,
4 first -- all counsel, understand I've read your motion, I've
10 : 02 : 33 5 read the response, and so I'm quite familiar with it and you do
6 not need to rehash it. You can point out something specific.
7 With that being said, I have a few questions.

8 Counsel for the plaintiff, I note, as I noted in
9 my August order, that most of the discovery that you are
10 seeking to obtain now was previously available to the
11 plaintiff. I understand the argument has been made that due to
12 the, quote, "negligence," unquote, of prior defense -- I'm
13 sorry, plaintiff's counsel, that that discovery was not
14 obtained and you're seeking to obtain it now.

10 : 03 : 21 15 Just as importantly, my understanding, and as to
16 Chief Lunsford and Ms. Julie Connell (sic), that in regards to
17 the depositions sought there, that these two witnesses were
18 previously questioned under oath at the Texas Workforce
19 Commission and at a TCOLE hearing. So, there is sworn
10 : 03 : 43 20 testimony that has been obtained from these two individuals. I
21 would like an explanation as to why that testimony could not be
22 used for purposes of the summary judgment response.

23 Now, my last point in regards to the motion for
24 summary judgment filed by the defendants, I understand that
10 : 04 : 14 25 they specifically cited Chief Lunsford and Ms. Connell with the

10 : 04 : 20 1 knowledge that the plaintiff had been terminated for
2 insubordination, and those were the two individuals, for lack
3 of a better phrase, that they hung their hat on when it came to
4 their motion. And so with that being said, I'll give you the
10 : 04 : 39 5 opportunity to point out anything specific that you want me to
6 understand, as well as respond to the questions and concerns
7 that I point out here this morning. Counsel?

8 *MR. POERSCHKE:* Yes. And my connection is breaking up
9 a little bit, Your Honor. I can hear you fine. So if you
10 : 04 : 58 10 cannot hear me, please, let me know. Okay?

11 *THE COURT:* I can hear you just fine.

12 *MR. POERSCHKE:* Okay. Good. Because I had to jump on
13 to use my cell phone for some reason. Normally my iMac works,
14 but I'm not sure what the issue is. It doesn't have the video
10 : 05 : 16 15 on.

16 Okay. So to break down your question, Judge --
17 those are good questions, and I already have the answers for
18 them. With regards to the grounds, essentially, upon which
19 discovery would be requested, I believe that there's two ways
10 : 05 : 29 20 that you can go with this. The first way is based off of your
21 prior order, Your Honor, and in regards to the diligence of
22 Ms. Webb at which she attempted to get evidence of -- to refute
23 the City's motion for summary judgment, you had indicated in
24 your prior order, Your Honor, essentially that she was -- that
10 : 05 : 52 25 she had diligently monitored the case. And I believe then that

10 : 05 : 55 1 that is -- those are facts that were interjected that allowed
2 you then to reopen the case.

3 So, what I have attempted to do in my motion for
4 discovery, essentially, is to highlight those actions upon
10 : 06 : 10 5 which my client took to also provide diligence with regards to
6 these deposition -- depositions that she requested at the time.

7 I have highlighted some communications with regards to her
8 interaction with her attorneys, and essentially there is an
9 e-mail indicating that communications that Mr. Kennard had with

10 : 06 : 35 10 Mr. -- is it Braun? I'm sorry.

11 *THE COURT:* Counsel --

12 *MR. POERSCHKE:* Am I pronouncing your name right,
13 Sean?

14 *MR. BRAUN:* Yes, you are.

10 : 06 : 41 15 *THE COURT:* And, counsel, let me interrupt you.

16 *MR. POERSCHKE:* Yes.

17 *THE COURT:* Because I'm aware of that and I don't take
18 issue with the fact --

19 *MR. POERSCHKE:* Okay.

10 : 06 : 47 20 *THE COURT:* -- that the plaintiff herself specifically
21 directed her attorneys to take actions on her behalf and that
22 they failed to do so. I have no issue with that, and I accept
23 that as a fact based upon the record that is before me.

24 With that being said though, however, I've
10 : 07 : 08 25 pointed out in my reading and understanding two specific

10 : 07 : 15 1 witnesses that would be germane to your response to the motion
2 for summary judgment, specifically, again, Chief Lunsford and
3 Ms. Connell. And as of right now, those are the two
4 depositions I'm considering. But with that being said, it's my
10 : 07 : 37 5 understanding that both of these witnesses have previously
6 given sworn testimony on the very issues that I would assume
7 you would raise in a deposition for purposes of compiling your
8 response.

9 So, why is it that their prior sworn testimony is
10 not suitable for incorporation into your response? Why would a
11 deposition be necessary to capture -- and I hadn't seen the
12 testimony, admittedly -- potentially capture the same testimony
13 and same sworn statements?

14 *MR. POERSCHKE:* Okay. Yes, Your Honor. The short
10 : 08 : 18 15 answer on that is that there are issues with regards to my
16 client's termination that are not contained in that F-5 hearing
17 or to cite, Your Honor. Now, to backtrack --

18 *THE COURT:* There were two hearings, Texas Workforce
19 and TCOLE. Are you saying that the information that you are
10 : 08 : 39 20 seeking is not contained in either of those instances?

21 *MR. POERSCHKE:* Yes, Your Honor. Because essentially
22 you have to remember that the City's legitimate reason for
23 terminating my client involved two, two points. They said that
24 she was insubordinate and they said that she was essentially
10 : 08 : 59 25 untruthful. Now, the insubordination arrises with her failure

10 : 09 : 04 1 to follow procedures and her alleged orders to participate in
2 the investigation. That was covered extensively in the TWC
3 hearing. It was covered extensively in the F-5 hearing.

10 : 09 : 19 4 The discovery that I'm seeking pays particular
5 attention and emphasis on the untruthfulness finding. Now, the
6 untruthfulness finding was utilized to prohibit the D.A. of
7 Montgomery County to prohibit Webb from testifying in court,
8 essentially indicating that she had to be placed on a Brady
9 list.

10 : 09 : 36 10 Webb was also found to be untruthful in a
11 polygraph examination where she was asked questions directly
12 about her -- the sexual assault that she experienced by
13 Sergeant Scott. As a result of that polygraph examination,
14 Webb was found to have been untruthful in holding that Scott
10 : 09 : 58 15 basically essentially sexually assaulted her.

16 But you can look and take a look at our Exhibit 7
17 attached to our motion for -- to reopen the case. That is a
18 document written by Chief Lunsford that sort of indicates that
19 although you contend that Scott's conduct was motivated by or
10 : 10 : 18 20 somehow related to your gender, no evidence substantiated this
21 contention. Therefore, on City's Exhibit No. 6, that's
22 Document 23-6, the chief indicated -- and this is in Ms. Webb's
23 termination letter -- that, therefore, based upon all the
24 information available at that time, an allegation you had been
10 : 10 : 41 25 untruthful during the investigation appeared valid. Then the

10 : 10 : 46 1 chief indicates that you did not submit to that examination
2 regarding the irreconcilable statements between you and
3 Sergeant Scott and the results of your examination showed
4 deception indicated.

10 : 10 : 59 5 So, therefore, in order to combat the City's
6 legitimate reason regarding the untruthfulness finding, that
7 gets into the issue with regards to Sergeant Scott. And
8 essentially the City's reason for finding Ms. Webb untruthful
9 was related to her untruthfulness and indicating to Chief
10 Lunsford and Mrs. O'Connell that she believed that Sergeant
11 Scott's conduct against her was motivated by some sort of
12 sexual predatory -- I think that the chief used the term
13 "gender issues."

14 And in that investigation, which involved --
10 : 11 : 37 15 contemporaneously with Webb's investigation, Sergeant Scott was
16 investigated. Attached to our motion to reopen the case, we
17 have, you know, witness statements, essentially, recordings
18 that were made during the investigatory process with another
19 officer by the name of Ryann Kaaa, indicated to Ms. O'Connell
20 that -- that Scott, the sergeant, had attacked one of the
21 witnesses I requested to depose. Her name was Stacey. That
22 there was another witness Stephanie, that's another witness I
23 requested to depose, sent genitalia photos -- or Scott sent
24 genitalia photos to her.

10 : 12 : 25 25 Stacey also indicated -- or Ryann Kaaa indicated

10 : 12 : 29 1 that Stacey had made -- that they -- Scott had propositioned
2 him for sexual intercourse.

3 So, it has to do -- it's not really a very
4 difficult issue. It's just that it has to do with that Scott
10 : 12 : 45 5 was a sexual predator and we can show that Scott did have
6 sexual predator and gender issues with regards to women, then
7 it's really not a stretch to say then that Webb was not
8 untruthful in stating that Scott's conduct was motivated by
9 gender.

10 : 13 : 03 10 So as a job -- you know, as a plaintiff's
11 attorney in employment law cases, it's my job to cast doubt or
12 to show how the City's legitimate reasons for terminating her,
13 especially with regards to the untruthfulness finding, which I
14 would say is the more important finding, because that
10 : 13 : 22 15 untruthfulness finding directly led to a letter by the
16 Montgomery County District Clerk -- the District Attorney that
17 indicated that, you know, Ms. Webb could not testify in court
18 anymore because of the untruthfulness finding against her. And
19 then that relates directly back to the allegation that my
10 : 13 : 43 20 client was found untruthful about, and that has to do with the
21 gender issues that Scott's conduct was motivated by gender.

22 So, that is something that was not fully
23 developed. It wasn't fleshed out at the F-5 hearing. My
24 client may have testified to it to some extent, but in terms of
10 : 14 : 08 25 Bill Helfand's sort of -- the thrust that he had at the F-5

10 : 14 : 14 1 hearing was focused on the insubordination, not on this -- the
2 untruthfulness charge as it relates to Mr. Scott's conduct.
3 And that's why I am requesting --

4 *THE COURT:* Counsel, let me interrupt you because --

10 : 14 : 27 5 *MR. POERSCHKE:* Yes, Your Honor.

6 *THE COURT:* -- I appreciate you focusing on those two
7 issues. And you've also outlined five other potential
8 witnesses, and I can frankly tell you that in regards to most
9 of them, I didn't see a good cause standard being met in
10 : 14 : 50 10 regards to those. Specifically, Mr. Helfand, who's an attorney
11 in this case, I think you outlined that he had a conversation
12 with a potential witness. You've not sought the deposition of
13 the witness he had the conversation with. But to the extent
14 that he had a conversation with a witness, that's what lawyers
10 : 15 : 15 15 do. And that does not create or transform him into a witness
16 based upon what has been outlined.

17 You also outlined -- or mentioned Assistant Chief
18 Slavin, and I believe it was Senior Officer Davis. And based
19 upon the reason for the termination, I'm not sure what Slavin
10 : 15 : 40 20 or Davis could speak to as to insubordination or
21 untruthfulness. And then, finally, there was Stacey Smith and
22 Stephanie Thompson; and I did not see a sufficiently
23 articulated reason for those depositions.

24 So, again, the Court's inquiry was somewhat
10 : 16 : 01 25 limited to Lunsford and Connell as to potential depositions to

10 : 16 : 08 1 follow up with. As I understand it, your point is that in
2 regards to the Texas Workforce examinations and the TCOLE
3 examinations as to Lunsford and Connell, that while they did go
4 into the insubordination, they did not go into untruthfulness,
10 : 16 : 30 5 which is another component that you want to test for purposes
6 of your response to the motion for summary judgment. Did I sum
7 that up correctly?

8 *MR. POERSCHKE:* That's correct, Your Honor. And if
9 you would like for me, I can explain. Slavin and Davis were
10 individuals that may have reported issues involving Scott to
11 the chief. So that would have placed the chief on notice that
12 Scott had -- or the chief had had notice prior to the issue of
13 Ms. Webb coming in and making her complaint that the chief knew
14 about --

10 : 17 : 04 15 *THE COURT:* Well, to the extent that you -- well, to
16 the extent that you are permitted to take the deposition of
17 Chief Lunsford, why wouldn't that be a preference of inquiry
18 with him as opposed to having these other two witnesses come in
19 and say that?

10 : 17 : 21 20 *MR. POERSCHKE:* Well, it would, Your Honor, and I
21 guess, it would depend upon what Chief Lunsford would testify
22 to. If he denied -- if he denied having conversations with
23 Slavin and Davis about these issues, then I guess then that
24 would then open the door up --

10 : 17 : 38 25 *THE COURT:* Have you had -- have you had conversations

10 : 17 : 39 1 with Slavin and Davis?

2 *MR. POERSCHKE:* No, I have not, Your Honor. But my
3 client --

4 *THE COURT:* So as to any potential conversation
10 : 17 : 47 5 between, for instance, Slavin and Lunsford, you have no
6 personal knowledge based upon a conversation with either Slavin
7 or Lunsford that a conversation has taken place; is that
8 correct?

9 *MR. POERSCHKE:* Well, I don't have any personal
10 knowledge, but my client's husband spoke with Chief Slavin
11 about the issues that she experienced with Scott. So my
12 client's husband can testify to that, if need be, Your Honor.

13 *THE COURT:* Okay.

14 *MR. POERSCHKE:* And then with regards to Davis, my
10 : 18 : 17 15 client can testify that she had a conversation with Davis
16 about -- Davis and then Davis indicated something to the effect
17 that he had reported these issues to the chief before. So, I
18 have -- my client can testify to that, Your Honor.

19 *THE COURT:* So if Chief Lunsford testifies one way,
10 : 18 : 39 20 you would be able to submit sworn testimony from someone in an
21 instance that it sounds like it would be based upon hearsay,
22 that this conversation took place?

23 *MR. POERSCHKE:* Well, again, I mean, my client would
24 say -- well --

10 : 18 : 56 25 *THE COURT:* She had a conversation. It would be a

10 : 18 : 57 1 sworn statement based upon hearsay?

2 *MR. POERSCHKE:* Right. Right.

3 *THE COURT:* Okay.

4 *MR. POERSCHKE:* I don't know -- it's not a -- my
10 : 19 : 06 5 client and my client's husband were not involved in the
6 conversation that Slavin had with the chief or that Davis may
7 have had with the chief, that's correct, Your Honor.

8 *THE COURT:* Okay. Thank you, counsel.

9 Now, let me turn my attention to the defense.

10 : 19 : 24 10 Counsel, as you've heard some of the concerns that I originally
11 expressed to plaintiff's counsel regarding the existence of the
12 Texas Workforce examination as well as TCOLE, but now here in
13 federal district court, you're seeking a dismissal of the
14 plaintiff's claims against your clients. To that extent, to
10 : 19 : 48 15 the extent you're asking me -- Mr. Helfand, you've been before
16 me over numerous years now and you know I don't mind shutting
17 the door of the courthouse when the facts and the law calls for
18 it. But you have probably also heard me use the phrase, "I
19 want everyone to have all the cards available before that
10 : 20 : 09 20 happens."

21 To the extent that plaintiff is now before me and
22 complaining that she does not have all her cards, specifically
23 due to the, quote, "negligence," unquote, of her prior
24 attorneys and that she would have been able to incorporate into
10 : 20 : 31 25 her response the potential deposition testimony of Chief

10 : 20 : 36 1 Lunsford and Ms. Connell -- and I'm focused on those two,
2 because it seems those were the two decision makers in her
3 termination based upon insubordination and being untruthful.
4 The simple fact that her prior counsel failed to take these
10 : 20 : 56 5 depositions when he should have and now you're asking me to
6 boot her out of court without having those two particular
7 cards, how does the Court reconcile these two issues as we move
8 forward?

9 *MR. HELFAND:* Yes, Your Honor. Well, let me say, we
10 start with the fact that Your Honor's order did not authorize
11 new discovery. In fact, Your Honor precluded that relief based
12 upon what I would submit is a well-reasoned decision. And
13 while I'm not here to apologize for Ms. Webb's prior counsel,
14 I'm not sure that they need an apology, Judge. I certainly
10 : 21 : 45 15 respect the Court as both an experienced litigator and now a
16 very experienced judge, in believing that there may have been
17 negligence involved here, but I certainly understand for
18 reasons I'll get into in just a moment why Ms. Webb's counsel
19 chose not to ask questions of the two people involved in the
10 : 22 : 08 20 decision, as the Court has pointed out correctly, to fire
21 Ms. Webb. That is Ms. O'Connell, the human resources director
22 for the city, and the chief of police, Chief Lunsford.

23 We all know as practitioners, that the more times
24 we ask questions, the more risk we run of getting equivocal
10 : 22 : 28 25 answers or the opportunity to repair damaging testimony that a

10 : 22 : 32 1 witness may perceive from prior events.

2 And so, again, I have my own opinions of
3 Ms. Webb's counsel and their conduct in this case specifically,
4 but I certainly understand, having -- and I think that this was
10 : 22 : 45 5 implicit in what Your Honor said, but I want to be sure the
6 record is clear, not just that Ms. O'Connell and Chief Lunsford
7 testified before the Workforce Commission under oath and the
8 SOAH judge in the TCOLE hearing, but that they were literally
9 cross-examined by Ms. Webb, through her counsel, at both of
10 those hearings. And Ms. Webb was present at both of those
11 hearings and therefore able to arm her counsel with information
12 that they might need to do their cross-examination.

13 You know where we are, Judge, respectfully is,
14 we're just beating a dead horse here, as the decision of the
10 : 23 : 26 15 Workforce Commission shows, as the decision of the SOAH judge
16 affirmed by the District Court in Austin shows, that Ms. Webb
17 was fired for dishonesty and insubordination. And I certainly
18 understand Mr. Poerschke's difficulty in kind of synthesizing
19 all of this coming to this event late. But some of the things
10 : 23 : 48 20 he's told the Court are just inaccurate. And I want to clarify
21 those. But before I do, I want to point out that, again, the
22 answer to the Court's first question is, if we stick to the
23 order that you entered, Judge, then what Ms. Webb was
24 authorized to do was submit into the summary judgment record
10 : 24 : 07 25 evidence she claims she already had. She told Your Honor

10 : 24 : 12 1 that -- she gave Your Honor some choices. One was to set aside
2 the summary judgment, reopen the case and allow her to do some
3 of the things she's proposing to do now, like take a bunch of
4 depositions.

10 : 24 : 24 5 The Court rejected that proposal, because Rule 59
6 did not authorize it under these circumstances. Rather what
7 the Court authorized was a limited alteration to the summary
8 judgment record, and it was -- and I understand -- and I
9 pointed this out to Mr. Poerschke when after we got the order,
10 Mr. Poerschke immediately wrote me and said, "Would you agree
11 we can now do depositions?" I said, "No." The Court set
12 September 3rd after an August order, to my understanding,
13 because the Court observed in its order that Mr. Poerschke had
14 said the plaintiff is already in possession of the evidence
10 : 24 : 58 15 that she needs. She just needs you to reopen the record, let
16 her put this evidence in, and then the Court would rule again
17 on the summary judgment based upon that evidence.

18 So, the door -- the Court opened the door
19 slightly, and I think appropriately under the rules, and told
10 : 25 : 17 20 the plaintiff you can slip that letter in the little slot here.
21 And what the plaintiff is trying to do is knock the door open
22 and say, I'm starting over. And so that isn't what the Court
23 authorized, first, and nor should it be, Judge, because
24 Mr. Poerschke's comments demonstrate the complete mistake that
10 : 25 : 37 25 the plaintiff has had in this case from day one and apparently

1 still has today. And some of the things Mr. Poerschke said are
2 just inaccurate. And, you know, I understand, because he's
3 trying to synthesize a lot of information. I don't think it's
4 intentional, but I don't want the Court to go away with less
5 than a thorough understanding. It's all, by the way, laid out
6 in the summary judgment.

7 Ms. Webb was the victim of a leg sweep, which
8 apparently was some kind of horseplay that several people in
9 the Huntsville Police Department thought was okay. The chief
10 obviously did not. But there's a video recording of Ms. Webb
11 standing in a room and then Sergeant Scott walks up behind her
12 and he sweeps her leg and she falls. That's what happened.
13 She made a complaint about that, and the City was investigating
14 that.

15 I think the most -- in my own personal opinion,
16 the most negligent thing her lawyers at the time did was to try
17 to turn that into a gender discrimination claim. And they
18 wrote a letter saying, She's complaining that that was
19 motivated by gender, that leg sweep. Okay. I don't see how
20 that works, but okay. And you are now on notice that if you
21 fire her or take any action against her -- and the reason they
22 needed to do this, Judge, by the way, is because the evidence
23 ultimately played out, and Ms. Webb even admitted, that she was
24 involved in some of the horseplay as well. But what her
25 lawyers at the time wrote was, If you take any action against

10 : 27 : 08 1 her, now you're retaliating against her for making a gender
2 discrimination claim.

3 Ms. Webb never provided any evidence that
4 Sergeant Scott was motivated to sweep her leg by her gender.

10 : 27 : 19 5 And, in fact, there was plenty of evidence that Sergeant Scott
6 was doing such stupid and inappropriate acts with both men and
7 women. And so why Ms. Webb's lawyers wrote that letter, I'll
8 never know. But if there was negligence in their conduct, I
9 think that that's probably where it lies. I think that they
10 thought they were going to protect Ms. Webb from some
11 discipline of her own by writing that letter.

12 Instead what happened was, the City then had to
13 take the leg sweep incident and now investigate an allegation
14 of somehow gender based conduct. And here's, Judge, where the
10 : 27 : 51 15 whole thing gets off track, and I'm sorry that Mr. Poerschke
16 has bought into this, which is he just told you all the things
17 he wants to do to prove that Sergeant Scott -- he's no longer a
18 sergeant. He was actually demoted because of this leg sweep
19 incident -- that Sergeant Scott is a sexual predator. What in
10 : 28 : 13 20 the world has that got to do with why this lady was fired? She
21 wasn't fired for claiming he was a sexual predator. She wasn't
22 fired for allegations of what he did to other people as it
23 relates to sexual conduct. Ms. Webb was fired -- and Your
24 Honor has this in the record. And I hope that you can take it
10 : 28 : 38 25 from me, Judge, but if you can't take it from me, take it from

1 another judge, the administrative law judge, as affirmed by the
2 Austin District Court, wisely did what I think this Court did
3 in ruling on the summary judgment, just set all of that aside,
4 because that's not why she was fired. And what that
5 administrative law judge found, and this is where Mr. Poerschke
6 is incorrect, the administrative law judge made a finding of
7 both insubordination and dishonesty.

8 Now, the dishonesty is not the untruthfulness in
9 the polygraph examination. It was -- it was certainly
10 reinforced by the finding by the polygraph examiner that
11 Ms. Webb was untruthful. But in the Workforce Commission
12 hearing and in the TCOLE hearing, both Ms. O'Connell and Chief
13 Lunsford testified that they independently determined that
14 Ms. Webb was lying to them in the investigation. And what was
15 she lying about? She was lying about the nature of her
16 relationship with then Sergeant Webb. The two of them had had
17 a -- what is often called sexting, s-e-x-t-i-n-g, relationship,
18 to which they both admitted. But Ms. Webb claimed that she did
19 not instigate that relationship and that she did not find it to
20 be consensual.

21 Sergeant Scott and Ms. Webb both took a polygraph
22 examination on that issue, not whether Sergeant Scott is a
23 sexual predator and not whether Ms. Webb's leg sweep was sexual
24 in nature, but who started the relationship and whether it was
25 consensual. And the polygraph examiner said Ms. Webb was

10 : 30 : 27 1 dishonest about that and that Sergeant Scott was honest about
2 that.

3 Now, again, however, both the Workforce
4 Commission testimony and the TCOLE hearing testimony
10 : 30 : 42 5 demonstrate that Ms. O'Connell and sergeant -- excuse me, Chief
6 Lunsford both determined in their mind that Ms. Webb was lying
7 about that before the polygraph examination. The
8 insubordination, Mr. Poerschke is partially right, not only
9 relates to Ms. Webb's conduct in refusing direct orders from
10 : 31 : 04 10 the chief to participate in the investigation, but also
11 Ms. Webb's tape-recorded, I guess the colloquial term would be
12 smart-mouthing the chief during his discussion with Ms. Webb.
13 And, again, Your Honor is not without a judicial determination
14 in this regard. The ALJ actually cites the language that
10 : 31 : 32 15 Ms. Webb used in, again, if the Court will allow me, smarting
16 off to the chief in a conversation where the chief is trying to
17 have a professional discussion with one of his subordinates.
18 So, again, both Ms. O'Connell and the chief were present for
19 that.

10 : 31 : 45 20 Ms. O'Connell said that, as the human resources
21 director, that such conduct is not tolerated within the City
22 and would always be the subject of adverse employment action
23 and often would be the subject of separation. The chief said
24 that based upon the paramilitary organization of a police
10 : 32 : 03 25 department, which the Fifth Circuit and this Court have

10 : 32 : 05 1 recognized, that adherence to order and adherence to rank are
2 paramount of importance and that such insubordination is its
3 own basis for separation.

4 So, the lady was fired for two reasons, Judge.

10 : 32 : 18 5 And both the chief and Ms. O'Connell have been, not just
6 testified, but cross-examined by Ms. Webb twice on these
7 issues. The whole question of whether Sergeant Scott --

8 *THE COURT:* Excuse me, Mr. Helfand, and let me stop
9 you there --

10 : 32 : 35 10 *MR. HELFAND:* Okay.

11 *THE COURT:* -- because I think you're about to go to a
12 point that I want specific emphasis on. I have a more basic
13 issue, and I appreciate the overview, again, about the facts
14 and as well from plaintiff's counsel. But I'm facing a more
10 : 32 : 56 15 fundamental question, and that is, in regards to receiving into
16 the record an amended response to the motion for summary
17 judgment that would put the Court in a position to rule on the
18 motion for summary judgment filed by the defendant, I'll have a
19 fully briefed, fully loaded motion for summary judgment and by
10 : 33 : 28 20 the same token, a fully briefed, fully loaded response to that
21 motion for summary judgment. I'm dealing with the fundamental
22 issue of fairness of having a complete factual record before
23 the Court. And I have been alerted by the plaintiffs -- the
24 plaintiff, I'm sorry, that it cannot be a fully loaded response
10 : 33 : 57 25 without the testimony of certain witnesses. And I've limited

10 : 34 : 02 1 my -- as you can see, to Chief Lunsford -- and I apologize, I
2 said Connell earlier, and it's O'Connell -- and to O'Connell,
3 those two particular witnesses.

10 : 34 : 20 4 And from your perspective as you go to this next
5 little area that you're about to, I assume, go into, is it fair
6 to say -- because admittedly, those two depositions in this
7 matter have not been taken. Can the Court go forward and view
8 the response of the plaintiff as fully loaded without having
9 these two key factual witnesses under oath via deposition in
10 this case for purposes of the response and consider itself
11 fully informed on the facts before it issues a ruling on your
12 motion for summary judgment? Do you understand what I'm
13 saying?

14 *MR. HELFAND:* I most certainly do, Your Honor. And,
10 : 35 : 04 15 again, I would reference the Court's conclusion to your order,
16 Docket No. 52, in which the Court granted a 60(b) motion but
17 denied a Rule 59(e) motion. Now, having said that, this case
18 is still before you, Judge. And obviously I know from my
19 experience with you, that you want to get it right. So, I
10 : 35 : 29 20 think the construct that the Court has created at the moment
21 would not permit that, but understanding today -- this is
22 obviously the benefit of the opportunity to interact with the
23 Court directly -- understanding today what the Court thinks is
24 necessary, I certainly understand where you're coming from,
10 : 35 : 49 25 Judge, in terms of your questions.

10 : 35 : 51 1 So let me offer this. I will say this.
2 Ordinarily my answer would be, Well, gosh, that's patently
3 unfair. The plaintiff gets to see my motion for summary
4 judgment and then start taking depositions? Okay. I mean, on
10 : 36 : 07 5 a just that broad of a question, I would say, no, that's not
6 fair.

7 Let me offer this, Judge, if it helps move things
8 along. Because this case -- again, these folks have testified
9 so many times. They've been cross-examined so many times.
10 : 36 : 22 10 They're so clearly on the record of what happened here, that
11 I'm okay with it. It suits the Court's purposes. Because I
12 want this to be affirmed on appeal. I think it will be as it
13 stands right now, but I want it to be affirmed on appeal. So
14 if it suits the Court's purposes, I'm okay with a two-hour
10 : 36 : 41 15 deposition of each of these people that is focused on the
16 question of the reason that they fired this lady.

17 What I'm worried about, Judge, is -- because I'm
18 getting it from my client, is after the Court entered its order
19 in August, Ms. Webb is out talking to employees of the City,
10 : 36 : 58 20 saying the Court has determined that her summary judgment was
21 not appropriate, that her case is back on the docket and that
22 she needs to collect evidence about what a bad guy Mr. Scott
23 is. And I don't want this being used to -- because it's a
24 small town, Judge, and he's still a cop up there. I don't want
10 : 37 : 18 25 this to be used as Ms. Webb's revenge of Sergeant Scott.

10 : 37 : 22 1 *THE COURT:* Well, let me interrupt you there, because
2 I think you've kind of hit the nail on the head, as far as my
3 solution goes. And Mr. Helfand and -- counsel for the
4 plaintiff, how do you pronounce your last name?

10 : 37 : 34 5 *MR. POERSCHKE:* It's Poerschke. Like a purse and a
6 key, Your Honor.

10 : 37 : 58 7 *THE COURT:* Poerschke. Mr. Poerschke, not only am I
8 dealing with an issue of the plaintiff's relief in its motion,
9 but three lawyers talking. There's another underlying issue
here with the way that the response has been filed as well as
11 other allegations in this case file, regarding previous
12 counsel. And as it is now set up, there is a potential that
13 some lawyer may have to call his or her carrier and that can
14 somewhat be fixed right now in allowing some of the issues that
10 : 38 : 38 15 were not tended to earlier to be legally tendered to now.
16 Because then the Court will have before it a full and complete
17 record and there could not be a decision made on an incomplete
18 record which could then later be used against another counsel.
19 And sometimes when people fall under the bus, they want to be
10 : 39 : 07 20 under the bus. Sometimes people fall under the bus
21 inadvertently. And if you can reach a hand down and keep
22 someone from being under the bus professionally, I would hope
23 that we would all want to do that because, you know, but for
24 the grace go I.

10 : 39 : 23 25 And so with that being said, I think Mr. Helfand

10 : 39 : 27 1 has laid out and addressed the concerns that the Court has and
2 I think most specifically, Mr. Poerschke, it gives you what you
3 need for your response based upon my understanding of this case
4 file and what has been asserted thus far. What the Court is
10 : 39 : 47 5 going to allow, you may take a two-hour deposition of Chief
6 Lunsford and a two-hour deposition of Ms. O'Connell. It is to
7 be limited to the reasons that the plaintiff was terminated and
8 any prior sworn testimony that was given at the Workforce or
9 TCOLE hearing in regards to testing their credibility.

10 : 40 : 26 10 I don't want it to be a rehash of the Workforce
11 or the TCOLE, because I already have -- you have access to
12 that. But if you think -- what I'm going at, if you think they
13 made a specific misrepresentation at either of those hearings
14 and you have proof of it, you can ask them about that such that
10 : 40 : 48 15 I can then determine, okay, this person has previously made a
16 misrepresentation under oath and you're bringing that to me for
17 purposes of their credibility only.

18 But the purpose of the deposition will be to
19 inquire as to why the plaintiff was terminated, because that is
10 : 41 : 08 20 the case that I have and that's the evidence that I will give
21 you access to. Once you have taken these two depositions, then
22 you may incorporate whatever testimony, as can the defendant,
23 in a reply. You can incorporate that into an amended response.
24 And then the Court believes it will be in a position to rule on
10 : 41 : 40 25 the motion for summary judgment.

10 : 41 : 44 1 Mr. Poerschke, is that clear?

2 MR. POERSCHKE: Yes, Your Honor, just as long as that
3 what I've stated previously about the untruthfulness finding
4 and how that untruthfulness finding is related to --

10 : 41 : 58 5 THE COURT: The termination. I think Mr. Helfand has
6 put in writing and has told me here today, that the reason for
7 the termination was insubordination and dishonesty. So both of
8 those can be the subject of the deposition, because those were
9 the reasons for the termination.

10 : 42 : 17 10 MR. POERSCHKE: Right. And then with regards to the
11 untruthfulness finding, that relates back to her deceptive
12 polygraph examination of which questions were asked of her
13 about Scott and her relationship with Scott and so that then --
14 those issues about Scott then factor into the City's legitimate
15 reason for terminating her under that untruthfulness category.

16 THE COURT: I'm not going to give you a deposition
17 outline. I'm giving you a deposition time limit and how you
18 inquire --

19 MR. POERSCHKE: Right.

10 : 42 : 49 20 THE COURT: -- the reasons for her termination
21 regarding insubordination and dishonesty is on you. But your
22 clock is ticking. You've got two hours to do it for each
23 witness.

24 MR. POERSCHKE: Yes, Your Honor.

10 : 43 : 03 25 THE COURT: All right. Now, anything unclear about

10 : 43 : 08 1 where I stand on this, Mr. Helfand?

2 *MR. HELFAND:* No, Judge, I appreciate that. Can we
3 just have a deadline? I'm happy to present these people very
4 promptly. I'd like to just kind of keep this thing moving, if
10 : 43 : 19 5 we can.

6 *THE COURT:* Right, and so would I. Well, let me
7 address one other issue before I get to that. Mr. Helfand, and
8 you are correct that under the August ruling, this was not
9 anticipated. But once I got the emergency motion, the issue
10 was more framed for me and so I wanted to make sure -- like
11 you, I'm considering the potential rulings in New Orleans, and
12 I wanted to make sure all the t's were crossed and i's were
13 dotted as to what the plaintiff had available for purposes of
14 responding to your motion for summary judgment.

10 : 43 : 59 15 *MR. HELFAND:* I understand, Judge, and I guess to your
16 benefit, you're the only one who's not constrained by your
17 rulings. So to the extent that you find it appropriate to make
18 a change, we understand your decision to do so.

19 *THE COURT:* Right. And the final point that you
10 : 44 : 13 20 make -- and believe me, I very much considered the fairness to
21 your client. You turned your cards over on the table and now
22 the plaintiff is going to get the opportunity to go out and
23 take a deposition having seen that and address specifically
24 some of the issues you raised. I understand the box that that
10 : 44 : 32 25 puts you in and -- but I don't believe fundamentally that it's

10 : 44 : 41 1 going to alter your legal position based upon the way that
2 you've framed this record. And so if we can cross a t and dot
3 an i by doing this, I think it's the appropriate thing to do.
4 And I think also by only taking two of the witnesses as opposed
10 : 45 : 04 5 to the seven and putting a time limit on it, that that's some
6 respect to the potential cost that your client is going to
7 incur as a result of this. So, by way of your explanation to
8 your client, you can tell them that was my thinking. And
9 believe me, I had in mind the potential impact on your side of
10 : 45 : 26 10 this as well.

11 *MR. HELFAND:* I appreciate that, Judge. Again, I
12 don't think that this is that case. There aren't any real
13 surprises. And, again, we share your desire to get it right.
14 So if this makes the Court more comfortable that it will be
10 : 45 : 42 15 right, I will say, I'll warn the Court now, that I'm going to
16 use it as an opportunity to press you harder on the res
17 judicata issue, but I'm sure you'll take that up when I present
18 it.

19 *THE COURT:* Exactly. Now, with that being said,
10 : 45 : 53 20 you -- I'll turn to what you inquired about, was a deadline.
21 It's September the 2nd. When do you anticipate that these two
22 witnesses can be presented and get a transcript back? When do
23 you think? Do you think we can get it done by the end of the
24 month?

10 : 46 : 18 25 *MR. HELFAND:* Oh, absolutely, Judge. I can present

10 : 46 : 19 1 them in the next 10 -- well, 14 days.

2 *THE COURT:* Okay. And then I think typically it
3 takes, you know, without a rush job on the transcript, it takes
4 a week or two. So, we're probably looking at one, two -- if
10 : 46 : 40 5 you can get back the transcript by one, two, three -- the 30th.
6 That's four weeks. That gives you some time, based upon your
7 calendars, to schedule it and then assume that we can get the
8 transcript back within a week or two.

9 How long after you get the transcripts,
10 Mr. Poerschke, will you be in a position to -- or how long will
11 it take you to file your amended response?

12 *MR. POERSCHKE:* I think two weeks will be appropriate,
13 Your Honor.

14 *THE COURT:* Okay. So that's October the 14th. Your
10 : 47 : 21 15 amended response will be due October the 14th.

16 Mr. Helfand, on your reply, it will be due -- is
17 October the 23rd sufficient, which is a week and a couple of
18 days afterwards?

19 *MR. HELFAND:* Speaking for Mr. Braun now, yes, Judge,
10 : 47 : 53 20 we'll get it.

21 *THE COURT:* Okay.

22 *MR. HELFAND:* Easy for me.

23 *THE COURT:* Easy for you. Okay.

24 *MR. BRAUN:* We can do it by the 23rd, Your Honor.

10 : 48 : 02 25 *THE COURT:* October the 23rd. So the amended response

10 : 48 : 05 1 will come in October the 14th -- no later than October the 14th
2 and the reply will come in no later than October the 23rd,
3 which will be -- and at that point it's on the Court's desk and
4 the Court will be able to deal with it.

10 : 48 : 22 5 All right. Gentlemen, having heard the Court's
6 rulings on this, on these issues and the revised deadlines,
7 Mr. Poerschke, any additional items for the Court this morning?

8 *MR. POERSCHKE:* No, Your Honor.

9 *THE COURT:* All right. Counsel for the defense,
10 Mr. Helfand, any additional items for the Court this morning?

11 *MR. HELFAND:* No, Judge. But thank you for letting us
12 talk this through with you. I think that that was very
13 helpful.

14 *THE COURT:* Well, thank you, counsel. And obviously,
15 you know, this is normally done in the courtroom, but in the
16 middle of this pandemic everyone is adapting to this new world
17 that we're in and I appreciate your professionalism in coming
18 to the Zoom hearing. I hope that your families and your staff
19 are safe. I looked forward to seeing you guys back in the
10 : 49 : 12 20 courtroom as soon as it's safe to do so. But in the meanwhile,
21 by all means make sure your families and staff remain safe.
22 With that being said, thank you, gentlemen, and you are
23 excused. The hearing is adjourned.

24 *MR. HELFAND:* Thank you, Judge. Same to you.

10 : 49 : 28 25 *MR. POERSCHKE:* Your Honor, thank you for your time

10 : 49 : 29 1 today in holding this hearing. I appreciate it very much, from
2 the plaintiff.

3 *THE COURT:* Thank you, sir.

4 *MR. POERSCHKE:* All right. Bye-bye.

5 *(Concluded at 10:49 a.m.)*

6 * * *

7 I certify that the foregoing is a correct transcript from the
8 record of proceedings in the above-entitled cause, to the best
9 of my ability.

10

11 /s/ Kathy L. Metzger
12 Kathy L. Metzger
Official Court Reporter

13 9-23-2020
14 Date

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